



1  
2 The following constitutes  
3 the order of the court. Signed November 22, 2011  
4  
5

*Charles Novack*

6  
7  
8  
9  
10 Charles Novack  
11 U.S. Bankruptcy Judge  
12  
13

14 UNITED STATES BANKRUPTCY COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16  
17

18 In re CEDAR FUNDING, INC.,

19 Case No. 08-52709-MM

20 Debtor.

21 Chapter 11

22 R. TODD NEILSON, Trustee for Debtor,  
23 CEDAR FUNDING, INC.,

24 Adversary No. 10-5157

25 Plaintiff,

26 vs.  
27  
28 **MEMORANDUM DECISION ON  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

E & F FINANCIAL SERVICES, INC.,

Defendant.

29  
30 **INTRODUCTION**

31 In this adversary proceeding, R. Todd Nielson, the Chapter 11 trustee of Cedar Funding, Inc.'s  
32 bankruptcy estate (the "Chapter 11 Trustee")<sup>1</sup>, seeks to avoid and recover more than one million dollars  
33 in alleged fraudulent transfers purportedly made by the debtor to E & F Financial Services, Inc. ("E&F")  
34 during a four year period before the Cedar Funding Chapter 11 case was filed. The Chapter 11 Trustee

35  
36  
37  
38 <sup>1</sup> Under the Chapter 11 Trustee's confirmed plan of reorganization, Russell Burbank  
39 serves as the plan administrator, and he is now the real party in interest. For ease of convenience,  
40 the court shall generically refer to the plaintiff as the "Chapter 11 Trustee."

1 seeks to recover under both Bankruptcy Code § 548 and California Civil Code §3439 *et seq.*, the latter  
2 of which codifies California's version of the Uniform Fraudulent Transfer Act. E&F now seeks summary  
3 judgment in its favor, arguing that the debtor received reasonably equivalent value for its payments to  
4 E&F. For the reasons stated below, the court denies summary judgment, but grants partial summary  
5 adjudication under F.R.B.P. 7056(d) with regard to certain facts as set forth below.

6 **FACTS**

7 The underlying transactional facts are undisputed. On January 14, 2000 Stil, Inc. ("Stil," a  
8 company unrelated to the debtor) borrowed \$875,000.00 from Cushman Capital Corporation, and secured  
9 the loan with a first deed of trust against real property located at 72 Chaparral Road, Carmel Valley,  
10 California (the "Chaparral Property"). On that same day, Stil borrowed an additional \$800,00.00 from  
11 "David Nilsen, dba Cedar Funding,"<sup>2</sup> which loan was secured by a second deed of trust directly junior  
12 to the Cushman Capital first deed of trust. In May 2002, E&F made a construction loan to Stil with a  
13 maximum principal amount of \$2.4 million. Stil immediately used the E&F loan to satisfy the Cushman  
14 Capital loan in full, and it secured the E&F loan with a first deed of trust against the Chaparral Property.  
15 As part of this May 2002 refinance, Nilsen subordinated his January 2000 deed of trust to the E&F deed  
16 of trust, and loaned Stil an additional \$300,000.00, which was secured by a third deed of trust against the  
17 Chaparral Property.

18 Stil defaulted on its E&F and Cedar Funding obligations in early 2004, and E&F recorded a notice  
19 of default in March 2004, which was swiftly followed by Cedar Funding's recordation of its own notice  
20 of default under the third deed of trust in early April 2004. On May 28, 2004, Cedar Funding cured Stil's  
21

---

22

23 <sup>2</sup> The court takes judicial notice that David Nilsen incorporated Cedar Funding, Inc. on  
24 May 13, 2003, slightly more than a year before the transfers at issue began. The Chapter 11 Trustee  
25 asserted during oral argument that Nilsen was the alter ego of Cedar Funding, Inc. To this judge's  
26 knowledge, this is the first time that the Chapter 11 Trustee has made this assertion. While this  
27 argument may or may not affect the ultimate outcome of this adversary proceeding, it is not relevant  
to this court's ruling. Accordingly, for ease of reference, the court will refer to both Nilsen and the  
underlying corporate Chapter 11 debtor as "Cedar Funding."

1 E & F default by paying \$120,370.95 to E&F<sup>3</sup> ( E&F thereafter rescinded its notice of default). Stil did  
2 not cure its Cedar Funding default, however, and Cedar Funding recorded a notice of sale on July 21,  
3 2004, conducted a trustee’s sale in August 2004, and purchased the Chaparral Property at its trustee’s  
4 sale. While the August 2004 trustee’s deed conveyed title to “David Nilsen, dba Cedar Funding,” Cedar  
5 Funding transferred title on September 17, 2004 by grant deed to Accustom Development LLC.

6 Accustom Development thereafter made regular, monthly payments to E&F under the E&F note  
7 from funds in the “Cedar Funding, Inc. Escrow Trust Account” or “Cedar Funding, Escrow Account.”  
8 The evidence indicates that Accustom Development paid E&F \$21,000.00/month from July 2004 to  
9 March 2008. No one disputes that the funds used to make these payments were Cedar Funding property.  
10 These monthly payments, when added to the \$120,370.95 cure payment, total \$1,044,370.95<sup>4</sup>. The  
11 Trustee seeks to avoid the Payments as fraudulent conveyances.

12        Although unstated by the parties in their memoranda of law, the court takes judicial notice of the  
13 extensive evidence presented in the underlying Chapter 11 case and the many other Cedar Funding  
14 adversary proceedings that demonstrate that Nielsen was operating a Ponzi scheme during most, if not  
15 all of the time in question. Neilson's operations are well explained in several decisions issued by this  
16 court, and those decisions are incorporate herein for the sole purpose of establishing the mechanics of  
17 the Ponzi scheme. *See e.g., Rollins v. Nielson (In re Cedar Funding, Inc.),* 408 B.R. 299 (Bankr. N.D.  
18 Cal. 2009), and *Nielson v. Aiken (In re Cedar Funding, Inc.),* 2009 WL 2849122 (Bankr. N.D. Cal. Jul.  
19 20, 2009). The court also takes judicial notice of the “Stipulation For Turnover Of Estate Assets And  
20 To Dismiss Adversary Proceeding” filed in this adversary proceeding, which determined that the  
21 Chaparral Property was Cedar Funding property.

<sup>4</sup> The reinstatement and monthly payments shall be referred to as the “Payments.”

## **PROCEDURE ON SUMMARY JUDGMENT**

2 The summary judgment standard under F.R.B.P. 7056 is well settled. Summary judgment  
3 should be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits  
4 show that there is no genuine issue as to any material fact and that the movant is entitled to judgment  
5 as a matter of law. Fed. R. Civ. P. 56(c)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23,  
6 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Only disputes “over facts that might affect the outcome of  
7 the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*  
8 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). This court’s  
9 duty is not to weigh the evidence and decide the truth of the allegations, but to determine whether  
10 there is a genuine issue for trial. *Id.* at 249. Where the non-moving party bears the burden of proof  
11 at trial “[s]ummary judgment is warranted if the nonmovant fails to ‘make a showing sufficient to  
12 establish the existence of an element essential to [his] case. *Nebraska v. Wyoming*, 507 U.S. 584,  
13 590, 113 S. Ct. 1689, 124 L. Ed. 2d 317 (1993). The moving party can meet its burden by pointing  
14 out the absence of evidence from the non-moving party,” and it “need not disprove the other party’s  
15 case.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987(9<sup>th</sup> Cir. 2006). Accordingly, the  
16 “nonmoving party must come forward with specific facts showing there is a genuine issue for trial.”  
17 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538  
18 (1986).

## **LEGAL ANALYSIS**

20 The Chapter 11 Trustee alleges four claims for relief to establish that the Payments are  
21 avoidable fraudulent conveyances. The Chapter 11 Trustee asserts parallel “actual fraud” claims for  
22 relief under Bankruptcy Code § 548(a)(1)(A) and California Civil Code §3439.04(a)(1), claiming that  
23 the Payments are avoidable because they were made with the actual intent to hinder, delay and  
24 defraud creditors. Bankruptcy Code § 548(c) and California Civil Code § 3439.08(a) provide  
25 affirmative defenses to E&F against these claims for relief. Section 548(c) provides that a transferee  
26 that takes “for value and in good faith has a lien on or may retain any interest transferred or may

1 enforce any obligation incurred, as the case may be, to the extend that such transferee ... gave value to  
2 the debtor in exchange for such transfer....” Similarly, California Civil Code § 3439.08(a) provides  
3 that “A transfer ... is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a  
4 person who took in good faith and for a reasonably equivalent value ....”

5 In turn, the “constructive fraud” claims for relief under Bankruptcy Code § 548(a)(1)(B) and  
6 California Civil Code § 3439(a)(2) require that the Chapter 11 Trustee prove that E&F did not  
7 provide reasonably equivalent value. These code sections generally provide that a transfer is  
8 avoidable as a fraudulent conveyance where the debtor received less than reasonably equivalent value  
9 in exchange for the transfer, and that the debtor was (1) insolvent when the transfer was made or  
10 became insolvent as a result of the transfer, (2) engaged in a business for which any remaining  
11 property was an unreasonably small amount of capital, or (3) intended to incur or believed that it  
12 would incur debt beyond its ability to pay as they matured.

13 While there are a series of tangled issues in this adversary proceeding, E&F’s primary ground  
14 for summary judgment is that it provided reasonably equivalent value in exchange for the Payments,  
15 and that it accepted the Payments in good faith. E&F argues that it would have foreclosed on the  
16 Chaparral Property if the Payments were not made, and that the Payments therefore allowed Cedar  
17 Funding to retain the Chaparral Property. E&F also argues that it accepted these payments in good  
18 faith. E&F maintains that its Stil loan was an arms length transaction, that it knew nothing of Cedar  
19 Funding’s Ponzi scheme while it was receiving the Payments, and that there are no facts indicating  
20 that it should have known or been put on notice of Cedar Funding’s fraudulent conduct. It further  
21 contends that it was required to accept the Payments under California Civil Code § 2924c(a)(1), and  
22 that it should not, as a matter of public policy, be penalized for accepting the Payments.

23 The Chapter 11 Trustee does not dispute that E&F accepted the Payments in good faith, and  
24 the court therefore grants partial summary judgment on this issue. While “good faith” is not  
25 susceptible to an exact definition, the standard is an objective one, requiring the court to examine  
26 what the transferee knew or should have known when the transfer was made. *In re Agric. Research*  
27 & Tech. Group, Inc., 916 F.2d 528, 535-36 (9<sup>th</sup> Cir. 1990). The declaration of Alexander Eisner,

1 E&F's vice president, details the history of the Stil loan and the Payments. His declaration  
2 establishes that E&F accepted the Payments in good faith, and the Trustee does not challenge these  
3 assertions.

4 E&F also has established that the Payments provided some value to Cedar Funding, as they  
5 prevented E&F from foreclosing on its deed of trust. This conclusion alone is insufficient, however,  
6 to grant E&F's motion for summary judgment. Bankruptcy Code §548(a)(2) and California Civil  
7 Code §3439.04(a)(2) require that this court conclude not just that "value" was given, but that such  
8 value was "reasonably equivalent value." Moreover, this determination must be made for each  
9 Payment when it was made.

10 As a preliminary matter, Bankruptcy Code § 548(d)(2) defines value to mean "property or  
11 satisfaction of securing of a present or antecedent debt of the debtor...." While neither Cedar Funding  
12 nor Accustom Development was a signatory to the E&F loan, a claim against a debtor includes a  
13 claim against property of the debtor. See Bankruptcy Code § 102(2). As stated above, property held  
14 by Accustom Development has been deemed to be Cedar Funding property. Moreover, the term  
15 "value" "includes 'any benefit' to the debtor, whether it is 'direct or indirect.' as value. *In re Image  
16 Masters, Inc.*, 421 B.R. 164, 178, ft. 14 (Bankr. E.D.Pa. 2009). Thus, there is no question of fact that  
17 the Payments - which were interest only payments - provided "value" by maintaining the loan  
18 balance and preventing foreclosure.

19 A finding of "reasonably equivalent value" is an intensively factual determination. Although  
20 this term is not defined in the Bankruptcy Code or in California Civil Code §3439 et. seq., it does not  
21 require a dollar-for-dollar exchange. *In re R.M.L.*, 92 F.3d 139, 145 (3<sup>rd</sup> Cir. 1999). The Third Circuit  
22 succinctly described "reasonably equivalent value" as follows: "The touchstone is whether the  
23 transaction conferred realizable commercial value on the debtor reasonably equivalent to the  
24 commercial value of the assets transferred. Thus, when the debtor is a going concern and its  
25 realizable going concern after the transaction is equal to or exceeds its going concern value before the  
26 transaction, reasonably equivalent value has been received." *Mellon Bank, N.A. v. Metro  
27 Communications, Inc.*, 945 F.2d 635, 647 (3<sup>rd</sup> Cir. 1991). The court must analyze all of the

1 circumstances surrounding the transfer in question, and its analysis must be determined from the  
2 perspective of the bankruptcy estate's creditors, not from the defendant's perspective. See *In re*  
3 *3DFX Interactive, Inc.*, 389 B.R. 842, 862-863 (Bankr. N.D.Cal. 2008).

4 Significant questions of fact exist regarding whether E&F provided reasonably equivalent  
5 value in exchange for the Payments. E&F contends that the Payments prevented its trustee's sale, but  
6 there is scant evidence regarding the value of the Chaparral Property when the Payments were made,  
7 and equally scant evidence regarding the equity that may have been preserved as a result.<sup>5</sup> Nor was  
8 any evidence presented regarding what other value Cedar Funding may have received.<sup>6</sup> The only  
9 evidence of value that E&F submitted was a statement of dubious admissibility by Alexander Eisner  
10 (E&F's vice president) that in February 2002, the Chaparral Property, "as completed," would be  
11 worth \$4.5 million - 4.75 million. No evidence was provided regarding (a) whether the Chaparral  
12 Property was commercial or residential, (b) the state of its construction when each Payment made,  
13 and (c) its value when each Payment was made and the resulting equity that was allegedly preserved.  
14 Absent such information, the court cannot grant summary judgment on the constructive fraud claims  
15 under Bankruptcy Code § 548(a)(2) and California Civil Code § 3439(b). Again, it is important to  
16 note that Cedar Funding was not a signatory to the E&F note, and the Payments did not provide a  
17 dollar for dollar reduction on any contract or promissory note to which it was a party. Instead, the  
18 Payments possibly maintained equity in the Chaparral Property, and it is this equity that may  
19 constitute reasonably equivalent value.<sup>7</sup> The court simply cannot determine the value given as a  
20

---

21       <sup>5</sup> While payments on fully secured obligations are not fraudulent transfers, as they are  
22 deemed to have been in exchange for reasonably equivalent value (see, e.g., *In re First Alliance*  
23 *Mortgage Co.*, 471 F.3d 977, 1008 (9<sup>th</sup> Cir. 2006), questions of fact exist regarding the Chaparral  
Property's value when the Payments were made.

24       <sup>6</sup> Both direct and indirect benefits may be evaluated in determining whether the debtor  
25 received reasonably equivalent value. See *In re Image Masters, Inc.*, 421 B.R. 164, 178, ft. 14  
(Bankr. E.D.Pa. 2009).

26       <sup>7</sup> These facts distinguish this case from *In re Image Masters, Inc.*, 421 B.R. 164  
27 (Bankr. E.D.Pa. 2009). In that Ponzi scheme case, the Image Masters debtors defrauded investors

1 matter of law based on the facts before it. This court is obligated to draw all reasonable inferences in  
2 favor of the Chapter 11 Trustee, and this requirement, along with the paucity of evidence, requires  
3 that this court deny the motion on the constructive fraud claims for relief.

4 The court finds similar questions of fact regarding the claims under Bankruptcy Code  
5 §548(a)(2) and California Civil Code §3439.04(b). “Reasonably equivalent value” is not an element  
6 of these claims for relief but instead forms an affirmative defense under Bankruptcy Code § 523(c)  
7 and California Civil Code § 3439.08(a)(1). These code sections allow E&F to retain “any interest  
8 transferred” to the extent that value was given. They thus require E&F to demonstrate that Cedar  
9 Funding received some financially quantifiable value in exchange for each Payment, and to quantify  
10 that value. As stated above, E&F has not quantified this amount, and thus reasonable questions of  
11 material fact exist regarding the extent of the value received by Cedar Funding.

12 The court also rejects E&F’s policy argument that California Civil Code § 2924c(a)(1)  
13 insulates it from liability. E&F’s argument misconstrues the focus of fraudulent conveyances.  
14 Fraudulent conveyance law focuses on the intent of the transferor and whether the transferor received

---

15  
16  
17 by convincing them to refinance their residences for more than the amount due on their existing  
18 deeds of trust, and to turn over the excess refinance proceeds to Image Masters. In exchange, Image  
19 Masters (i) provided them with notes and deeds of trust with better terms, (ii) instructed the  
20 investors to make their monthly mortgage payments (on the Image Masters-created notes) to Image  
21 Masters, and (iii) informed the investors that Image Masters would pay the (real) refinance notes  
22 with the monthly payments that they received and make up the difference between their refinance  
23 notes and the Image Masters notes by investing the excess refinance proceeds (or simply using those  
24 proceeds to pay the monthly differential). The Chapter 7 Trustee sued the banks to recover the  
25 mortgage payments as fraudulent conveyances. The Bankruptcy Court dismissed the complaint on  
26 the ground, *inter alia*, that Image Masters received reasonably equivalent value for each mortgage  
27 payment. The Bankruptcy Court noted that even though Image Masters did not owe the banks  
anything, “Image Masters received in return an equal dollar-for-dollar reduction in its liability to the  
homeowners under the Image Masters Notes and Mortgages. I reiterate that this is so because: (1)  
Image Masters had contractually agreed with the homeowners to pay the regular monthly amounts  
due on the conventional mortgages with [the banks]; and (2) each transfer to a [bank] constituted a  
disbursal to or for the benefit of the homeowner [on the contract between the homeowner and Image  
Masters]. *Id.* at 179.

1 reasonably equivalent value in return for its transfers. E&F's policy argument is at odds with the  
2 fundamental purpose of fraudulent conveyance law.

3 The court therefore denies E&F's motion for summary judgment. The court finds, however,  
4 that no triable question of fact exists regarding the element of good faith under Bankruptcy Code §  
5 548(c) and California Civil Code § 3439.08(a), and finds that E&F has established this element for  
6 purposes of trial.

7  
8 IT IS SO ORDERED.

9 \*\*\*\* END OF ORDER \*\*\*\*

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 A.P. No. 10-5157

2

3

4

**COURT SERVICE LIST**

5

Cecily A. Dumas  
FRIEDMAN, DUMAS AND SPRINGWATER  
33 New Montgomery St., Suite 290  
San Francisco, CA 94105

6

Cheryl Rouse  
LAW OFFICES OF ROUSE AND BAHLERT  
345 Franklin Street  
San Francisco, CA 94102

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28